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Environmental Protection Agency FOIA Conference  
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**Significant New Decisions**

Exemption 1

ACLU v. DOJ, Nos. 10-4290, 10-4289, 10-4647, 10-4668, 2012 WL 1829579 (2d Cir. May 21, 2012) (Wesley, J.). Holding: Reversing the district court's judgment insofar as it required disclosure of portions of two memoranda prepared by OLC and transcripts of an *in camera*, *ex parte* proceeding; and affirming the district court's determination with respect to the withholding of records and a photograph pursuant to Exemption 3.

Exemption 2

Brown v. FBI, No. 10-1292, 2012 WL 2786292 (D.D.C. July 10, 2012) (Lamberth, J.). Holding: Denying defendant's motion to dismiss; but granting defendant's motion for summary judgment on the basis that it conducted an adequate search, and properly withheld certain information pursuant to Exemptions 3, 7(C), 7(D) and 7(E); and denying plaintiff's motion for sanctions as well as his motion to supplement his motion for sanctions.

Inst. for Pol'y Stud. v. CIA, No. 06-960, 2012 WL 3301028 (D.D.C. Aug. 14, 2012) (Lamberth, J.). Holding: Granting, in part, defendants' motion for summary judgment on the basis that certain withholdings under Exemptions 1, 2, 3 and 7(E) were proper and that plaintiff conceded other withholdings under Exemptions 2, 3, 6, 7(C), 7(D) and 7(F), and that all reasonably segregable material was released; denying plaintiff's motion to strike portions of the declarations; and ordering CIA to conduct searches for responsive records in three different directorates which were not initially searched.

Exemption 3

Batton v. Evers, No. 08-20724, 2010 WL 625988 (5th Cir. Feb. 24, 2010) (Haynes, J.). (26 U.S.C. § 6103(a) & 26 U.S.C. § 6103(e)(7)). The IRS cited the first of these statutes to withhold third party tax information. However, "it is impossible to tell from the [IRS] declaration and the rest of the summary judgment record what information is contained within the 'case history notes and information from private sources' and whether, in whole or in part, the documents contain third party taxpayer information."

Exemption 4

Watkins v. U.S. Bureau of Customs & Border Protect., No. 09-35996, 2011 WL 1709852 (9th Cir. May 6, 2011) (Walter, J.). Holding: Affirming the district court's decision that Exemption 4 applies to the requested material, but concluding that CBP has waived that protection; and reversing the district court's determination that DHS's regulations control, rather than CBP's regulations, for FOIA fee purposes.

Exemption 5

McKinley v. Bd. of Gvn'rs of the Fed. Reserve Sys., No. 10-5353, 2011 WL 2162896 (D.C. Cir. June 3, 2011) (Henderson, J.). Holding: Affirming the district court's grant of summary judgment to the Board based on its finding that the Board's withholdings pursuant to Exemption 5 were appropriate.

Exemptions 6

Prudential Locations LLC v. HUD, No. 09-16995, 2011 WL 2276206 (9th Cir. June 9, 2011) (Berzon, J.). Holding: Vacating the district court's grant of summary judgment to HUD and remanding the matter for further proceedings.

Exemption 7

Blackwell v. FBI, No. 10-5072, 2011 WL 2600831 (D.C. Cir. July 1, 2011) (Kavanaugh, J.). Holding: Affirming the district court's decision that the FBI properly invoked Exemptions 7(C) and 7(E) and conducted an adequate search.

Exemption 7A

Van Bilderbeek v. DOJ, No. 10-12416, 2011 WL 118247 (11th Cir. Jan. 14, 2011) (per curiam). The Eleventh Circuit affirms the district court's grant of summary judgment to government on the basis that the records at issue were properly withheld pursuant to Exemption 7(A).

Exemption 7C

FCC v. AT&T, Inc., 131 S. Ct. 1177 (U.S. Mar. 1, 2011) (Roberts, C.J.). The Supreme Court holds that "the protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations."

World Publ'g Co. v. DOJ, No. 11-5063, 2012 WL 560891 (10th Cir. Feb. 22, 2012) (Kelly, J.). Holding: Affirming the district court's decision that defendant's assertion of Exemption 7(C) to protect third-party booking photographs was appropriate; and concluding that the district court did not abuse its discretion in denying plaintiff's request for discovery.

#### Exemption 7D

Pickard v. DOJ, No. 08-15504, 2011 WL 3134505 (9th Cir. July 27, 2011) (Silverman, J.). Holding: Reversing district court's grant of summary judgment and concluding that the DEA cannot assert the *Glomar* response in conjunction with Exemptions 7(C) and 7(D) to deny the subject of the request's status as an informant where the government officially confirmed that status in open court in the course of official proceedings; and remanding the matter for the district court to determine the appropriateness of DEA's exemption claims.

Prudential Locations LLC v. HUD, No. 09-16995, 2011 WL 2276206 (9th Cir. June 9, 2011) (Berzon, J.). Holding: Vacating the district court's grant of summary judgment to HUD and remanding the matter for further proceedings.

#### Exemption 7E

Allard K. Lowenstein Int'l Hum. Rts. Project v. DHS, No. 09-2225, 2010 WL 4704322 (2d Cir. Nov. 22, 2010) (Rakoff, J.). Holding: The Second Circuit affirms that the district court ruling that the redacted portions of the requested memorandum were properly withheld pursuant to Exemption 7(E).

#### Exemption 7F

Jordan v. DOJ, No. 10-1469, 2011 WL 6739410 (10th Cir. Dec. 23, 2011) (Kelly, J.). Holding: Affirming the decision of the district court granting summary judgment to BOP based on the propriety of its Exemptions 7(E) and 7(F) withholdings; and, after considering application of Exemption 7(E) for material formerly withheld pursuant to High 2 at the district court level, concluding that Exemption 7(E) covers the material at issue.

#### Exemption 8

Judicial Watch, Inc. v. Dep't of Treasury, No. 09-1508, 2011 WL 2678930 (D.D.C. July 11, 2011) (Howell, J.). Holding: Granting Treasury's motion for summary judgment except for three documents that contain reasonably segregable material that should have been released. Based on an *in camera* review and the agency's submissions, the court holds that defendant properly withheld certain "information obtained from [a bank's] federal regulator, the FDIC," pursuant to Exemption 8.

#### Procedural Considerations

##### Adequacy of Search

White v. DOJ, No. 12-5067, 2012 U.S. App. LEXIS 14864 (D.C. Cir. July 19, 2012) (per curiam). Holding: Affirming the district court's grant of summary judgment to EOUSA based on the adequacy of its search.

Ctr. for Biological Diversity v. Office of the USTR, No. 10-35102, 2011 U.S. App. LEXIS 19197 (9th Cir. Sept. 16, 2011) (unpublished disposition). Holding: Vacating the district court's grant of summary judgment to defendant; and remanding for further proceedings.

### Segregability

Covington v. McLeod, No. 09-5336, 2010 U.S. App. LEXIS 14871 (D.C. Cir. July 16, 2010) (Per curiam). The court concludes that "because the exempt and non-exempt information in the grand jury material and proffer statement are 'inextricably intertwined,' any excision of exempt information would impose significant costs on the agency and produce edited documents with little informational value."

### Agency Records

Judicial Watch, Inc. v. Fed. Housing Fin. Agency, No. 10-5349, 2011 WL 3375576 (D.C. Cir. Aug. 5, 2011) (Griffith, J.). Holding: Affirming the judgment of the district court that Fannie Mae and Freddie Mac records are not "agency records" subject to the FOIA.

### Reasonably Described Records

Wells v. U.S. Dep't of Educ. Off. for Civ. Rts., No. 11-30686, 2011 WL 5840221 (5th Cir. Nov. 21, 2011) (per curiam). Holding: Affirming the district court's dismissal of plaintiffs' Complaint.

### Attorney Fees

Brayton v. Office of the U.S. Trade Rep., No. 09-5402, 2011 WL 1466337 (D.C. Cir. Apr. 19, 2011) (Griffith, J.). Holding: Affirming the district court's denial of plaintiff's request for attorney fees where USTR declassified and released the requested trade agreement to the public after the parties moved for summary judgment but before the court ruled.

Bigwood v. Def. Intelligence Agency, No. 08-1431, 2011 WL 988883 (D.D.C. Mar. 22, 2011) (Urbina, J.). Holding: Denying plaintiff's motion for relief upon reconsideration and his motion for attorney's fees.

Citizens for Resp. & Ethics in Wash. v. DOJ, No. 10-750 (D.D.C. Dec. 8, 2011) (Boasberg, J.). Holding: Granting defendant's motion to enter judgment and reducing plaintiff's fee award to \$7,158.13, the amount recovered for work completed before the government's Rule 68 Offer of Judgment.

Judicial Watch, Inc. v. DOJ, No. 06-406, 2011 WL 1195789 (D.D.C. Mar. 31, 2011) (Kennedy, J.). Holding: Granting plaintiff an award of attorney fees.